IN THE

Supreme Court of the United States

October Term, 1974

No. 74-615

FRANCIS A. RONDEAU,

Petitioner,

vs.

MOSINEE PAPER CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT

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for the Seventh Circuit

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

1. Did the court of appeals err in determining that some equitable relief was appropriate for a conceded failure timely to file a Schedule 13D where the persons who acquired 5 percent without filing continued for nearly three months to buy additional shares?

2. Where there was a conceded failure timely to file a Schedule 13D and the persons who acquired 5 percent without filing continued for nearly three months to buy additional shares, did the court of appeals err in instructing the district court to enter a decree enjoining (a) further violations of the Act, and (b)

voting of the shares acquired in violation of the Act for a period of five years?

3. Where there was a conceded failure timely to file a Schedule 13D and the persons who acquired 5 percent without filing continued for nearly three months to buy additional shares, did the court of appeals err by reversing a summary judgment in favor of those persons on the basis of "findings of fact" as to their knowledge of the law, states of mind and motives, where conflicting inferences concerning those matters could be drawn from affidavits, deposition testimony and documents submitted on the motion?

COUNTERSTATEMENT OF THE CASE

For his statement of the case, petitioner (hereinafter "Rondeau") has related "a synopsis of the operative facts found by the District Court." (Br. Pet. 7). The district court's "findings", improper on a motion for summary judgment,[1] do not fairly state the case. From facts permitting conflicting inferences to be drawn, the district court drew all inferences and resolved all questions

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[1] "Findings of fact" are not only unnecessary on decisions of motions under Rule 56 (Rule 52(a), last sentence), but are ". . . ill advised since [they] would carry an unwarranted implication that a fact question was presented." *General Teamsters, Chauffeurs & Helpers Union v. Blue Cab Co.*, 353 F. 2d 687, 689 (7th Cir. 1965), citing *A R Inc. v. Electro-Voice, Inc.*, 311 F. 2d 508, 513 (7th Cir. 1962); *United States v. Mills*, 372 F. 2d 693, 696 (10th Cir. 1966). *See Trowler v. Phillips*, 260 F. 2d 924, 926 (9th Cir. 1958). In this case Judge Doyle's findings comprised a seven-page fact portion of his Opinion and Order, and additional findings are scattered throughout an "opinion" portion. The scope of review is unlimited as to these "findings" made without a trial, *see United States v. U.S. Gypsum Co.*, 333 U.S. 364, 394-395 (1948), which should be regarded as "subordinate conclusions of law." *Silverstein v. United States*, 419 F. 2d 999, 1001 (n. 3) (7th Cir. 1969), *cert. denied*, 397 U.S. 1041 (1970).

of credibility in Rondeau's favor. On remanding for entry of injunctive relief, the court of appeals perceived the case not solely in the perspective of the district court, but rather, in the broader context of documentary evidence, deposition testimony and affidavits from which reasonably drawn inferences conflict sharply with the district court's premature "findings". To assure awareness of that broader perspective, respondent (hereinafter "Mosinee") states the case as follows:

Rondeau — described in his district court brief as a "successful and knowledgeable businessman" whose "business activities include . . . banking and a variety of investments. . ."[2] — made his first purchase of Mosinee stock (500 shares) on April 5, 1971. By May 17, 1971 he had acquired 40,413 shares — some in his own name, some in the names of his controlled corporations and other entities.[3] That number of shares constituted more than 5 percent of Mosinee's common stock outstanding. Within ten days thereafter, by May 27, Rondeau was required by law to file with the Securities and Exchange Commission and mail to Mosinee a Schedule 13D comprehensively disclosing his identity, the identities of his associates, their backgrounds, holdings, financing and purposes in acquiring the stock. He did not file. Rather, he continued to buy an additional 26,268 shares through August 4 (A. 48-52), before he filed on August 25.

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[2] Brief in Support of Defendants' Motion for Summary Judgment, Appeal Doc. No. 15, pp. 4, 8.

[3] The entities were: Wausau Cold Storage Company, Inc., Mosinee Cold Storage, Inc.; Francis Rondeau, Inc.; Rondeau Foundation; Rondeau & Company; Ronco; Emjay Corporation Master Profit Sharing Plan dated October 14, 1968. (Answer ¶13, A. 35). There is no evidence that any representative of Mosinee knew of Rondeau's affiliation with these entities at the time he acquired more than 5%, nor that Mosinee shareholders who were selling to Rondeau ever had such knowledge until he finally filed on August 25, 1971.

Rondeau contends that he did not "seriously consider" attempting to gain effective control of Mosinee until August 9, when, having been warned by Mosinee's management that he might have a securities law problem, he talked to his lawyer. But Rondeau's own statements make that seem doubtful.

In the Schedule 13D he filed August 25, Rondeau equivocated:

> "Item 4. *Purpose of Transaction.*
>
> "Francis A. Rondeau determined during early part of 1971 that the common stock of the Issuer was undervalued in the over-the-counter market and represented a good investment vehicle for future income and appreciation. Francis A. Rondeau and his associates presently propose to seek to acquire additional common stock of the Issuer in order to obtain effective control of the Issuer, but such investments as originally determined *were* and are *not necessarily made with this objective in mind.*" (A. 194) (Emphasis supplied).[4]

A deposition question put to Rondeau was:

> "Subsequent to the time that you started acquiring Mosinee Paper Corporation stock in April of 1971, when did you start discussing generally with people the possible invitation for tender offers?" (Rondeau Dep., Appeal Doc. No. 23, p. 83).

Rondeau answered (*id.*, pp. 84-85):

> "A. I specifically discussed this with Ray Heckman on and about the date of the first purchase of

[4] This artful but most equivocal statement has stood, unamended, for nearly three and one-half years. If it has stood the test of time so well as to reflect Rondeau's current state of mind, it is a marvel of sophistication by a businessman supposedly unsophisticated in the intricacies of contesting corporate control. If not, it should be amended.

Mosinee stock, and shortly before that, and my next discussions were with Piper & Jaffrey & Hopwood asking them for whatever information in blurb sheets and what else was out, stuff that the mill had had done in the way of public relations that were spread around the country by Piper Jaffrey. A man by the name of Riordan wrote this up, which I thought was a public relations form, which was somewhat identical to the one that they had done on Wausau Paper Mills, and I also discussed this specifically with Ed Seim of Baird & Company, and the general conclusion was that this is an underpriced stock.

"Q. Your discussion at that time was about possible tender offers, is that correct?

"A. Just the purchase of these shares, and I had no intention at that time of acquiring effective control of that company.

"MR. BECKWITH: Can we have an adjournment for a few minutes while I stretch my legs.

"MR. HAMMOND: All right.
(short recess taken.)"

It is difficult to believe that motivations like those reflected in the following account of Rondeau's statements arose suddenly, on or about August 9:

"He intends to obtain control partly through his purchase of additional stock and either through locking in proxies through the formation of certain voting trusts which would include some 20,000 odd shares owned by Maggie Dessert, formerly of this bank, or through friends in the Wausau/Mosinee area including the Schutte's of Wausau Homes. His purpose in attempting to gain control of Mosinee Paper is to break what he describes as a strangle

hold which John Forester has on the company and the Wisconsin River Valley." [5]

There are other indications of an earlier gestation of an intent to seek control.

When he placed an order for 15,000 shares early in April 1971, Rondeau thought "something was wrong with management." (Rondeau Dep., Appeal Doc. No. 24, pp. 147, 152). He thought earnings were not what they should have been, and that sales could be improved by eliminating "archaic" distribution methods (*id.*, pp. 152, 232-233). He believed that Mosinee President Scholtens was "stifled and, sometimes, even strangled" — apparently by Board Chairman Forester. (*Id.*, p. 168). When asked in April whether he thought he could accomplish the changes in management he considered necessary, Rondeau answered, "Somebody was going to have to try." He thought he could "help" bring about changes in management by changing the board of directors. (*Id.*, pp. 147-148).

In late May or early June, Rondeau told Scholtens that he intended to acquire up to 40,000 shares (just less than 5 percent and approximately the maximum amount that Rondeau could acquire without being required to file a Schedule 13D), and implied confidence in management.[6] (Scholtens Dep., Appeal Doc. No. 34, pp. 16, 17). Actually, he had already acquired more than 5 percent, and had serious questions about management. (Dessert Dep. Appeal Doc. No. 39, pp. 8, 16; Rondeau Dep., Appeal Doc. No. 24, p. 220).

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[5] (A. 129); Memorandum dated September 2, 1971 by Jon C. Bruss, Assistant Vice-President and Commercial Loan Officer, Marine National Exchange Bank, Milwaukee, of conversations with Rondeau September 1 and 2, 1971.

[6] Although Rondeau and his associates actually acquired beneficial ownership of more than 40,000 shares on May 17, Mosinee transfer sheets did not disclose that fact until July 9. (A. 41-42, 51).

One of the people Rondeau thought would go along with him was Margaret Dessert (Heckman Dep., Appeal Doc. No. 27, p. 25), a stockholder of Mosinee who controls more than 20,000 shares and with whom Rondeau had frequent contact. On several occasions Rondeau told her not to sell. (Dessert Dep., Appeal Doc. No. 39, p. 11). Rondeau talked to her in June about putting shares in a voting trust more effectively to control management. (*Id.*, pp. 15-16).[7] John Altenburg, another Rondeau supporter (Heckman Dep., Appeal Doc. No. 27, p. 25) who controlled about 16,000 shares (Altenburg Dep., Appeal Doc. No. 44, p. 6), was present at that discussion (Dessert Dep., Appeal Doc. No. 39, p. 16). At that time (June, 1971) Rondeau, Altenburg and Dessert were unhappy with Mosinee management. (*Id.*, pp. 8, 16; Rondeau Dep., Appeal Doc. No. 24, p. 220).

Brokers with whom Rondeau dealt testified that Rondeau might have discussed the subject of obtaining control with them in July. (Heckman Dep., Appeal Doc. No. 27, p. 23; Jeub Dep., Appeal Doc. No. 29, p. 16; Seim Dep., Appeal Doc. No. 26, p. 28). According to Heckman, Rondeau on *July 30 or 31* (Heckman Dep., Appeal Doc. No. 27, p. 23, lines 14-15) talked about a *tender offer* (*id.*, p. 22); about acquiring 51% (*id.*, p. 23); about financing a tender offer by selling securities and borrowing from the First Wisconsin National Bank (*id.*, pp. 23-24); and about certain stockholders who felt the same way he did and who would go along with him (*id.*, pp. 24-25).[8]

Instead of filing a Schedule 13D as required by May 27, Rondeau continued to buy Mosinee stock from investors who did not know what they might have known

[7] See note 5, above, and appended text.

[8] See note 5, above, and appended text.

had a Schedule 13D been filed: that Rondeau was buying heavily, contemplated a contest for control of Mosinee, and was considering a public cash tender offer for the stock as well as soliciting support. After May 27, Rondeau bought 16,384 shares of Mosinee stock at relatively low and stable prices (A. 48-50) from investors who might well have refused to sell the stock or demanded a higher price had they known what Rondeau had in mind or even the facts that he had acquired more than 5 percent and intended to buy more shares. If that information had been disclosed on May 27, Rondeau might have found the stock unavailable, or its price excessive.[9]

Although warned by Mosinee management on July 30 that he might be violating the federal securities laws (A. 53), Rondeau continued buying Mosinee stock through August 4. By that time he had acquired 66,577 shares, aggregating approximately 8 percent of Mosinee's outstanding stock. Not until August 25 was a Schedule 13D filed at all. Mosinee management was "completely surprised" by the disclosure that Rondeau was considering a cash tender offer. (Scholtens Dep., Appeal Doc. No. 34, p. 26). Not until September 29 was a Schedule 13D filed which purported accurately to describe Rondeau's financing and allocate the securities purchased to the persons in whose names they had been registered.

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[9] Activity such as Rondeau so tardily disclosed — or even the possibility of such activity — tends to increase the market price of the stock. After Rondeau finally filed a Schedule 13D on August 25, 1971 and the filing became public knowledge, the price of Mosinee's stock in the over-the-counter market spurted from 13 to quotes as high as 19-21. (A. 46).

SUMMARY OF ARGUMENT

The decree that the court of appeals ordered the district court to enter — enjoining further violations of the Williams Act and "neutralizing" the violation by barring Rondeau and his associates from voting the shares acquired without disclosure — struck an appropriate balance between divestiture and absolution. In a case where the late filing of a Schedule 13D is clearly "intentional covert, and conspiratorial"* the only appropriate remedy would be divestiture. Short of that, in a case where there may be doubt as to the intent of the persons who acquired shares without disclosing the information required by section 13(d), limitations on voting the stock acquired without disclosure are appropriate.

Several purposes are served by such a decree. First, even such limited relief deters violation of the Williams Act (and analogous provisions of the federal securities laws) by judicial signal that failures to file will not be ignored and cannot be "cured" — exonerating the late filer from any liability — by filing only when the violation is discovered.

Second, the injunction ordered by the court of appeals will fulfill the reasonable expectations of uninformed investors who purchased Mosinee common stock between May 27 and August 25, 1971. In ignorance of the facts a Schedule 13D would have disclosed, they believed they were buying into a company whose stock and management were stable. Instead, there existed an impending tender offer or proxy fight, and a management occupied for an extended period of time in litigating a violation of the federal securities laws. Those investors deserve a measure of stability.

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* Court of Appeals decision, 500 F. 2d at 1017; A. 169.

Third, the decree tells issuers faced with undisclosed acquisitions of their stock that suits brought to enforce the law are not in vain. The violator cannot escape merely by filing late.

The most sensible way to accomplish these ends is, in some degree, to deny the wrongdoer the fruit of his violation. In this case the court of appeals exercised appropriate judgment in reaching that objective.

Irrespective of the terms of the decree it fashioned, the court of appeals was clearly correct in reversing a summary judgment based on "facts" improperly "found" on a motion for summary judgment. Knowledge of the law, intent and purpose, where sharply conflicting inferences may reasonably be drawn from deposition testimony, affidavits and documents, can only be ascertained upon trial. Summary judgment was clearly inappropriate in these circumstances, and if this Court disagrees with the court of appeals' disposition of the case, remand for trial is essential.

ARGUMENT

I. INJUNCTIVE RELIEF OF THE KIND THAT THE COURT OF APPEALS IN THIS CASE CONSIDERED APPROPRIATE MUST BE AVAILABLE TO PRIVATE ENFORCERS OF THE WILLIAMS ACT REGARDLESS OF THE STATE OF MIND OF THE VIOLATOR IF PRIVATE ENFORCEMENT IS TO BE EFFICACIOUS.

A. If belatedly filing a Schedule 13D precludes injunctive relief for the violation, the incentive to file on time (and concomitant protection of stockholders and prospective stockholders) is drastically reduced.

The Williams Act remedied "[t]he failure to provide adequate disclosure to investors in connection with a

cash takeover bid or other acquisitions which may cause a shift in control. . . ." H. R. Rep. No. 1711, 90th Cong., 2d Sess. (1968); 1968 U.S. Code Cong. & Admin. News, p. 2812.

It was created ". . . to close a gap in the disclosure requirements of existing securities laws by requiring full disclosure by persons or groups who 'purchase by direct acquisition or by tender offers * * * substantial blocks of the securities of publicly held companies.'" *Bath Industries, Inc. v. Blot,* 427 F. 2d 97, 102 (7th Cir. 1970).[10]

Section 13(d) of the Securities Exchange Act of 1934 (the "Exchange Act"), created by the Williams Act in 1968, provides the mechanism for such disclosure:

> "[t]he purpose of section 13(d) is to require disclosure of information by persons who have acquired a substantial interest, or increased their interest in the equity securities of a company by a substantial amount, within a relatively short period of time." S. Rep. No. 550, 90th Cong., 1st Sess. (1967); H. R. Rep. No. 1711, 90th Cong., 2d Sess. (1968); 1968 U.S. Code Cong. & Admin. News, p. 2818.

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[10] Senator Williams stated the purpose of his bill as being "to require the disclosure of pertinent information * * * when a person or group of persons seek to acquire a substantial block of equity securities of a corporation by a cash tender offer or through the open market or privately negotiated purchases * * *." 113 Cong. Rec. 24664 (1967). In the Senate hearings on the Williams Act, Senator Kuchel stated:

> "The stockholders have a right to know who they are dealing with, what commitments have been made, and the intention and plans of the offeror. Our securities market must be founded not on those whom [Thomas] Jefferson termed 'gambling scoundrels' who operate in 'great mystery' but on those shareholders who make informed decisions based on disclosure of pertinent facts." *In re The Susquehanna Corp.,* SEC File No. 3-1868, August 5, 1969; ['69-'70 Decisions] CCH Fed. Sec. L. Rep. ¶77,741, at 83,697.

Under section 13(d), as amended, persons acquiring beneficial ownership of more than 5 percent of a class of equity security registered pursuant to Section 12 of the Exchange Act must within ten days file with the SEC and mail to the issuer (and each exchange where the security is traded) a statement containing the detailed information prescribed by Schedule 13D.[11] Required is comprehensive disclosure of their identities, backgrounds, financing, purposes, holdings and recent transactions in the security. Without such disclosure, "investors cannot assess the *potential* for changes in corporate control and adequately evaluate the company's worth." *GAF Corp. v. Milstein,* 453 F. 2d 709, 717 (2d Cir. 1971), *cert. denied,* 406 U.S. 910 (1972) (emphasis supplied). By enacting section 13(d), Congress has deemed the information required to be disclosed thereunder to be "material", i.e., "information . . . as to which an average prudent investor ought reasonably to be informed

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[11] The reporting requirement threshhold was reduced from 10 percent to 5 percent in December 1970 to "provide public disclosure of impending corporate takeovers at a more meaningful level." H. R. Rep. No. 91-1655, 91st Cong., 2d Sess. (1970); 1970 U.S. Code Cong. & Admin. News, p. 5027.

> "An investment of between 5 and 10 percent of the securities of a company can have a significant impact on the public market for that company's stock. Shareholders of the target company are entitled to full disclosure when over 5 percent of their company's stock is to be acquired by an outside group. These acquisitions may lead to important changes in the management or business of the company and the shareholders should be fully informed." *Id.* at 5027-5028.

The SEC is presently considering the necessity or desirability of recommending legislative amendments to Congress with respect to (1) a further lowering of the reporting threshhold, and (2) adding a substantially shorter notice requirement to the present 10 day reporting requirement. SEC Securities Exchange Act Release No. 11003, Part III.F (September 9, 1974); SEC Securities Exchange Act Release No. 11088 (November 5, 1974).

before buying or selling the security. . . ." 17 C.F.R. §240.12b-2(j). An investor holding a security that is the object of a 5 percent holder's plans to buy additional shares might prefer to hold or demand a higher price if he knew of those plans. A prospective purchaser might be dissuaded or encouraged by such disclosure. After the investor buys, sells or holds in ignorance, it is too late; the purpose of requiring disclosure has been defeated by the late filing. A late filing, whether intentionally late or not, does not remedy the wrong.

It is undisputed that by May 17, 1971, Rondeau had purchased over 5 percent of Mosinee's stock and was required to make the mandatory disclosures within ten days thereafter. But he did not. Instead, for a period of 69 days, from May 27 to August 4, 1971, Rondeau, and six corporations and a partnership which he controlled, bought an additional 16,384 shares of Mosinee stock at relatively low and stable prices from shareholders who might well have refused to sell their stock or demanded a higher price had they known of Rondeau's purchases or considerations (however "serious") to obtain effective control of Mosinee.[12] There is also a substantial probability that the decisions of investors who bought or held Mosinee shares during the delinquency period would have been affected by the information required to have been disclosed. The market Rondeau entered as a buyer was unaffected by investment activities that would have resulted from disclosure. Rondeau's failure to file created precisely the kind of situation the

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[12] The price paid for these shares ranged only from $12½ to $13 per share. (A. 49-50). After the 13D information became public, the quoted price jumped to $19 to $21 per share. (A. 46).

Williams Act was designed to preclude.[13] It kept actual and potential investors either misinformed or uninformed concerning Mosinee stock. *Graphic Sciences, Inc. v. International Mogul Mines Ltd.,* [Current] CCH FED. SEC. L. REP. ¶94,834 (D.D.C. 1974).

In *Bath Industries, Inc. v. Blot,* 427 F. 2d 97 (7th Cir. 1970), a case concerning late Williams Act filing, the court dealt with the question whether a late filing "cures" the failure to file earlier:

> "If defendant-appellants were in fact required to file statements pursuant to the Williams Act sometime near mid-summer of 1969, the filing of 13D Schedules in October, 1969 may well be insufficient to cure the failure to file earlier. The purpose of the filing and notification provisions is to give investors and stockholders the opportunity to assess the insurgents' plans *before* selling or buying stock in the corporation. It additionally gives them the opportunity to hear from incumbent management on the merit or lack of merit of the insurgents' proposals. *If the defendant-appellant's late filing is sufficient, then no insurgent group will ever file until news of their existence and plan leaks out and prompts a law suit. By that time it will be too late to avoid the evils which the Williams Act is designed to eliminate."* 427 F. 2d at 113 (second emphasis supplied).

Consistently, the Seventh Circuit in the instant case rejected Rondeau's protestation that his violation was "merely technical":

> "By failing to timely file, Rondeau effectively failed to disclose to investors and management the circum-

[13] "The persons seeking control . . . have information about themselves and about their plans which, if known to investors, might substantially change the assumptions on which the market price is based. This bill is designed to make the relevant facts known so that shareholders have a fair opportunity to make their decision." H. R. Rep. No. 1711, 90th Cong., 2d Sess. (1968); 1968 U.S. Code Cong. & Admin. News, p. 2813.

stances surrounding his potential to effect the control of Mosinee Paper while at the same time he continued to purchase securities in a market that had not been adequately apprised of such potential. Under the circumstances, Rondeau's failure to timely file was more than a mere technical violation of the Williams Act." *Mosinee Paper Corp. v. Rondeau,* 500 F. 2d 1011, 1016 (7th Cir. 1974); (A. 168).

Having "considered all the circumstances concerning Rondeau's violation of section 13(d)", the court of appeals instructed the district court to enter a decree (a) enjoining Rondeau and his associates from further violations of section 13(d), and (b) that the shares (that Rondeau bought from investors who did not know what they would have known had he timely filed) "not be permitted to be voted with respect to any takeover, proxy contest, or vote for officers and membership on the board of directors for a period of five years."[14] 500 F. 2d at 1017; (A. 169-170).

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[14]The court of appeals did not specify the date from which the five-year period should run. Alternatives available to the district court on remand would include: (1) the date on which the last share was acquired without the requisite disclosure (August 4, 1971), (A. 50); (2) the date the injunction is entered; (3) the date the court of appeals entered its order remanding the case to the district court for entry of the injunction (July 16, 1974). See note 15, below.

The injunction should probably apply to the shares in the hands of Rondeau, his associates and affiliates, and anyone acquiring them from such persons for the purpose of engaging, or in connection with engaging, in a tender offer or proxy contest, but need not continue to apply if the shares are transferred to unaffiliated persons for purposes unrelated to the violation. Thus, the restriction against voting would apply to the stock only in the hands of a holder to whom the taint of the violation should be attributed. *Cf. Chris-Craft Indus., Inc. v. Piper Aircraft Corp.,* 480 F. 2d 341, 380 (n. 36) (2d Cir.), *cert. denied,* 414 U.S. 910, 414 U.S. 924 (1973); *Graphic Sciences, Inc. v. Int'l Mogul Mines Ltd.,* [Current] CCH FED. SEC. L. REP. ¶94,834 (D.D.C. 1974).

Such a decree is "appropriate to neutralize Rondeau's violation of the Act and to deny him the benefit of his wrongdoing." 500 F. 2d at 1017; (A. 170). In *Chris-Craft Industries, Inc. v. Piper Aircraft Corp.*, 480 F. 2d 341, 380 (2d Cir.), *cert. denied*, 414 U.S. 910, 414 U.S. 924 (1973), the Second Circuit held that a Williams Act violator should be denied the fruits of its illegal conduct:

> "We further hold that BPC should be denied the fruits of obtaining Piper shares illegally. We therefore direct that the district court include in its judgment an injunctive provision barring BPC from voting for a period of at least 5 years the Piper shares it obtained through the unlawful May cash purchases and those it obtained through its exchange offer."[15]

Rondeau attempts to distinguish *Chris-Craft* principally upon the ground that his illegally obtained "fruits" (2 percent of Mosinee) are not so sweet as the fruits Bangor-Punta would have enjoyed but for the injunction (14 percent of Piper Aircraft Corp.[16]). (Br. Pet. 21-22). That distinction is not meaningful. As the Seventh Circuit in *Bath Industries, Inc. v. Blot*, 427 F. 2d 97, 113 (7th Cir. 1970) observed:

> "If all that was done was to forbid a repetition of the illegal conduct, those who had unlawfully built their empires could preserve them intact * * *." (Quoting *Schine Chain Theaters, Inc. v. United States*, 334 U.S. 110, 128 (1948)).

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[15] On remand, the district court entered an injunction barring BPC from voting the shares for a period of five years from the date of its decree. *Chris-Craft Indus., Inc. v. Piper Aircraft Corp.*, 384 F. Supp. 507, 525-526 (S.D.N.Y. 1974).

[16] The injunction was ordered only with respect to the 231,828 shares (of 1,644,890 shares outstanding) that Bangor-Punta acquired in violation of the federal securities laws.

The size of the illegally acquired empire is irrelevant to the determination whether anything should be done about its illegal acquisition. It is true that in this case the block of shares illegally acquired is not a controlling block. That is passively relevant in the sense that the number of shares enjoined from being voted automatically "let[s] the punishment fit the crime." (Br. Pet. 22). *See Electronic Specialty Co. v. International Controls Corp.*, 409 F. 2d 937, 947 (2d Cir. 1969).

The district courts have followed the Seventh and Second Circuit Courts of Appeals, forbidding Williams Act violators to vote shares illegally acquired:

> "If Section 13(d) means anything, plaintiff Dopp should not be permitted to gain advantage from a course of action pursued in clear violation of law. At the very least, considerations of equity demand that Dopp be disenfranchised from voting at the December 14th meeting those shares he acquired after January 4, 1971, in excess of the 2% exemption provided by the Williams Act. *See Ozark Air Lines, Inc. v. Cox*, 326 F. Supp. 1113 (E.D.Mo. 1971).
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> * * *
>
> "Accordingly, it is ordered that . . . (2) defendants' cross-motion for a preliminary injunction be granted . . . to the extent of enjoining plaintiff Paul S. Dopp from voting those shares of Butler's stock he acquired after January 4, 1971 in excess of 2% of the total of each class of security outstanding." *Committee for New Management of Butler Aviation v. Widmark*, 335 F. Supp. 146, 155-156 (E.D. N.Y. 1971).

See also, Water & Wall Associates, Inc. v. American Consumer Industries, Inc., [1973 Decisions] CCH FED. SEC. L. REP. ¶93,943 (D.N.J. 1973) (preliminary injunction against voting all shares owned by group); *Cat-*

tlemen's Investment Co. v. Fears, 343 F. Supp. 1248, 1253 (W.D.Okla. 1972) (injunction against voting). *Cf. Graphic Sciences, Inc. v. International Mogul Mines Ltd.*, [Current] CCH FED. SEC. L. REP. ¶94,834 (D.D.C. 1974) (voting or disposal to unaffiliated persons permitted; solicitation of proxies, tender offer and any further acquisition forbidden pending trial).

At page 20 of his brief, petitioner selectively reviews some Williams Act cases to try to show that "the courts have generally insisted that violations be cured, but have imposed no further permanent or punitive penalty." From the cases selected for review[17] that generalization is ineluctable, since in none of them had shares consummately been acquired in violation of the Act. In cases where that has happened, the court has imposed some continuing limitation on the violator. *Bath Industries, Inc. v. Blot, supra; Chris-Craft Industries, Inc. v. Piper Aircraft Corp., supra; Committee for New Management of Butler Aviation v. Widmark, supra; Cattlemen's Investment Co. v. Fears, supra; Graphic Sciences, Inc. v. International Mogul Mines Ltd., supra; Water & Wall Associates, Inc. v. American Consumer Industries, Inc., supra.* Indeed, the Second Circuit recognized in one of the inapposite cases petitioner reviews that in a late filing case it might be appropriate "to penalize [the] non-disclosure and deter offerors generally from playing their cards too close to the vest." *Corenco Corp. v. Schiavone & Sons, Inc.*, 488 F. 2d 207, 214 (2d Cir. 1973).

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[17] *Butler Aviation Int'l, Inc. v. Comprehensive Designers, Inc.*, 425 F. 2d 842 (2d Cir. 1970); *Ronson Corp. v. Liquifin Aktiengesellschaft*, 370 F. Supp. 597 (D.N.J.), *aff'd* 497 F. 2d 394 (3d Cir.), *cert. denied*, — U.S. — (1974); *Corenco Corp. v. Schiavone & Sons, Inc.*, 488 F. 2d 207 (2d Cir. 1973); *Soneste Int'l Hotels Corp. v. Wellington Associates*, 483 F. 2d 247 (2d Cir. 1973); and *Texasgulf, Inc. v. Canada Dev. Corp.*, 366 F. Supp. 374 (S.D.Tex. 1973).

"[T]he possibility of civil damages or injunctive relief serves as a most effective weapon in the enforcement of the proxy requirements," *J. I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964), and Williams Act filing requirements are no different in this respect. As the Seventh Circuit warned in *Bath Industries, Inc. v. Blot, supra*, in language frequently cited by the district courts,[18] "[i]f the . . . late filing is sufficient, then no insurgent group will ever file until news of their existence and plan leaks out and prompts a law suit." 427 F. 2d at 113. Deterrence is vital. The court of appeals' direction to enter an injunction against voting the illegally acquired stock for a period of five years strongly prompts Williams Act compliance, and by implication, compliance with other disclosure requirements of the federal securities laws. That, we submit, is not only appropriate but essential to operation of the Congressional scheme for protection of investors, actual and potential, against non-disclosure of information material to their decisions whether to buy, sell or hold securities. As this Court has noted: (1) the Securities Exchange Act "quite clearly falls into the category of remedial legislation"; (2) "remedial legislation should be construed broadly to effectuate its purposes"; and (3) one of the central purposes of the Exchange Act is to "protect investors through the requirements of full disclosure. . . ." *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967). These observations are particularly pertinent to Williams Act cases. Unless there is timely compliance, the issuer is deprived of the information deemed material by statute, and is unable to fulfill its duties to make prompt public disclosure of such information.

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[18] *See, e.g., Comm. for New Management of Butler Aviation v. Widmark*, 335 F. Supp. 146, 155 (E.D.N.Y. 1971); *Cattlemen's Inv. Co. v. Fears*, 343 F. Supp. 1248, 1253 (W.D.Okla. 1972).

Petitioner argues that "Mr. Rondeau would not have been deterred by the threat of an injunction because he did not know that he was required to file a Schedule 13D and might suffer a penalty if he failed to file."[19] (Br. Pet. 17). That is not very fitting. Mr. Rondeau describes himself as a "successful and knowledgeable businessman" whose "business activities include . . . banking and a variety of investments."[20] When such businessmen are buying hundreds of thousands of dollars worth of publicly held securities, they (and their lawyers, bankers and brokers) ought to be encouraged to ascertain the laws concerning required SEC filings. Dissemination of decisions like the court of appeals' decision in this case has that salutary effect.

There is yet another reason why "neutralization" was appropriate in this case regardless of the "state of mind" of the Williams Act violator. While persons who sold Mosinee stock to Rondeau (in ignorance of the facts a filing would have disclosed) theoretically have actions for any damages incurred as a result,[21] nevertheless there are investors who were or might have been prejudiced by Rondeau's failure to file, but have no remedy to assuage their injury. Persons who purchased Mosinee stock be-

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[19] This assumes (as the district court improperly "found") that Rondeau was in fact ignorant of the law. It was not appropriate to resolve his state of mind on a motion for summary judgment where conflicting inferences could be drawn. See pp. 30-34, below.

[20] Brief in Support of Defendants' Motion for Summary Judgment, Appeal Doc. No. 15, p. 4.

[21] Such an action, in which the attorneys representing Mosinee here are also representing the named plaintiff in a class, is pending in the Western District of Wisconsin (*Wisconsin Valley Trust Co. v. Rondeau et al., No.* 71-C-336, filed September 2, 1971). In that action the plaintiff has moved for a Rule 23(c) determination as to maintainability; defendants opposed the motion. There have been no further proceedings pending the outcome of the action now before this Court.

tween May 27 and August 25, 1971 may not have done so had they known of Rondeau's activities and the upheaval inspired by his violations. Changes in management, tender offers or proxy fights are often abhorrent to conservative investors planning to hold shares for an extended period of time in expectation of a stable yield with average potential for capital appreciation. In this case management suffered months of distraction trying to remedy and contend with Rondeau's non-disclosure. Such an investor, who held the stock throughout the period of artificial inflation generated by Rondeau's heavy buying over the summer of 1971, through its decline to levels at which he purchased it (and below), has no damage claim; but he is entitled to have his reasonable expectations — price and managerial stability — fulfilled. The decree ordered by the court of appeals is appropriate to that end.

Petitioner cites *Kern County Land Co. v. Occidental Petroleum Corp.*, 411 U.S. 582 (1973) as a holding by this Court "in another area of securities law that it will not impose a harsh penalty for a technical violation of a statute in circumstances where to impose a penalty would not further the legislative policies of the Act." (Br. Pet. 18). *Kern County* was a case arising under Section 16 (b) of the Securities Exchange Act of 1934, 15 U.S.C. §78p(b), which makes recoverable by the issuer any profit realized by a beneficial owner of more than 10 percent of any class of equity security of the issuer "from any purchase and sale . . . within a period of less than six months. . . ." The question in *Kern County* was whether a merger should be treated as a "sale" within the meaning of the statute; if it were so treated, whether there was a violation of the statute. The Court held that where the transaction involved was not a "traditional cash-for-stock" purchase

or sale, liability should not attach unless the trader either had or was likely to have had access to inside information, thereby serving the express statutory purpose "of preventing the unfair use of information which may have been obtained by such beneficial owner, director or officer by reason of his relationship to the issuer. . . ." 15 U.S.C. §78p(b). Since the defendant Occidental Petroleum neither had nor was likely to have such access, there was no statutory "sale" and therefore — since there was no violation — no liability. Here, by contrast, there is a conceded violation of an unambiguous statute in circumstances where the statutory purpose to assure disclosure of relevant information was frustrated by the undisclosed acquisition of a substantial block of shares. It is submitted that failure to impose a significant sanction in such circumstances would drastically weaken the effectiveness of the Williams Act, in conflict with the legislative policies which it reflects. The courts must provide "full and effective relief" under their equity powers when the Act is violated, or the Act will not be enforced. *Cf. GAF Corp. v. Milstein,* 453 F. 2d 709, 722 (n. 26) (2d Cir. 1971), *cert. denied,* 406 U.S. 910 (1972).

There is another answer to petitioner's recurring, rhetorical assertions that the injunction entered was too "punitive", "drastic", "inflexible", "putative", and "severe":

> "[C]ourts are authorized, indeed required, to decree relief effective to redress the violations, whatever the adverse effect of such a decree on private interests. Divestiture is itself an equitable remedy designed to protect the public interest. In *United States v. Crescent Amusement Co.,* . . . where we sustained divestiture provisions against an attack similar to that successfully made below, we said . . . : 'It is said that these provisions are inequitable and harsh income tax wise, that they exceed any reasonable require-

ment for the prevention of future violations, and that they are therefore punitive. . . . Those who violate the Act may not reap the benefits of their violations and avoid an undoing of their unlawful project on the plea of hardship or inconvenience.'" *United States v. E. I. duPont de Nemours & Co.*, 366 U.S. 316, 326-327 (1961) (discussing remedy of divestiture for violation of the antitrust laws).

B. The state of mind of a Williams Act violator is irrelevant to the question whether relief should be granted, and under the court of appeals' decision, district courts are not (as petitioner contends) "bound to enter an injunction for every violation of the Williams Act no matter how technical, insubstantial, or moot."

In determining the scope of relief to be granted, the court of appeals "[gave] effect especially to the district judge's findings that 'Mr. Rondeau and the other defendants did not engage in intentional covert, and conspiratorial conduct in failing to timely file the 13D schedule' . . . ." 500 F. 2d at 1017; (A. 169). For reasons explained elsewhere in this brief[22] such a finding was impermissible on a motion for summary judgment and should have been disregarded by the court of appeals. Nevertheless, assuming *arguendo* that the "finding" was proper, the decree ordered is appropriate.

As aptly stated by the Second Circuit in *GAF Corp. v. Milstein*, 453 F. 2d 709, 717-718 (2d Cir. 1971), *cert. denied*, 406 U.S. 910 (1972) (emphasis supplied):

> "That the purpose of section 13(d) is to alert the marketplace to every large, rapid aggregation or accumulation of securities, *regardless of technique employed*, which might represent a potential shift in

[22] Note 1 above; pp. 30-34, below.

corporate control is amply reflected in the enacted provisions.

* * *

"The history and language of section 13(d) make it clear that the statute was primarily concerned with disclosure of *potential changes* in control resulting from new aggregations of stockholdings. . . ."

The position that *no* relief may be granted absent "intentional covert, and conspiratorial conduct" is untenable in light of the statutory purpose to apprise the investing public of *potential* shifts in control. An utterly innocent failure to file by a person making substantial stock acquisitions who lacks any knowledge of the law creates the same *potential* for a shift in control as a calculated, secretive accumulation of shares by a sophisticated corporate "raider." If, as Rondeau contends, he was more innocent than culpable, this case dramatically illustrates the reason why an innocent 5 percent acquisitor should file on time. For when the violation was brought to his attention, Rondeau promptly formulated an intention "to obtain effective control of the Issuer." (A. 194). The *potential* — or a latent intent — was there from the beginning. The mere reduction of thought to writing by the act of filing was sufficient to prompt its emergence. To deny relief for such a violation abrogates the statute short of a point it is intended to reach.[23]

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[23] The law under section 16(b), 15 U.S.C. §78p(b), is analogous. Where there is a clear transgression of the objective statutory standard, neither the intent of the violator, the existence or nonexistence of the actual abuse of inside information at which the statute is directed, nor even whether the possibility of such abuse existed, is relevant. *E.g., Lewis v. The Dekcraft Corp.*, ['73-'74 Decisions] CCH FED. SEC. L. REP. ¶94,620 (S.D.N.Y. 1974). The *Kern County, supra,* "actual-potential-for-abuse threshhold test" is not applicable where the transaction is clearly within the statute, "since that potential is presumed if the elements of the section are satisfied." *Provident Securities Co. v. Foremost-McKesson, Inc.*, 506 F. 2d 601, 605 (9th Cir. 1974), *cert.*

Nor should the availability of any relief depend on whether or not there has been or is (at the time the injunction is sought) an extant tender offer or proxy fight. Petitioner's brief in the court below suggests that as soon as this action terminates in defendants' favor they will be in a position to wage a proxy fight or make a tender offer. (Br. Def.-Appellees, pp. 9, 46). In the great majority of cases arising under the Williams Act, preliminary injunctions have been sought and granted because of the perceptible imminence of a shift in control or attempt to shift control. *See e.g., Gulf & Western Industries, Inc. v. The Great Atlantic & Pacific Tea Co., Inc.*, 476 F. 2d 687 (2d Cir. 1973); *Electronic Specialty Co. v. International Controls Corp.*, 409 F. 2d 937 (2d Cir. 1969). A similar *potential* exists here.

Petitioner tries to help his case by characterizing the court of appeals' decision as something it quite clearly is not: a precedent *requiring* in every case entry of a decree like the court of appeals ordered in this case. We are told that the decision "mandates imposition of a severe penalty against an offeror — sterilization of his stock's voting rights — regardless of the factual background which led to violation of the statute" (Br. Pet. 16); "*requires* a penalty for a technical, unknowing violation * * * [or] a harsh punitive order in every case to carry out the purposes of the Williams Act" (*id.*); "requires some punitive remedy for every violation" (*id.* at 23); and "impair[s] the essential element in fashioning appropriate judgments in Williams Act cases — flexi-

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[23] (Continued)
granted, — U.S. —, Dkt. 74-742 (Feb. 18, 1975). Where the violation is not clearly established, the possibility of abuse becomes determinative — even if the defendant was not aware of such possibility — but intent and whether actual abuse occurred are still irrelevant. *Makofsky v. Ultra Dynamics Corp.*, 383 F. Supp. 631 (S.D.N.Y. 1974).

bility" (*id.* at 25). This unwarranted hysteria ignores the record that was presented. The court of appeals had before it not only the district court's decision on defendants' (petitioner's) motion for summary judgment, but also 1288 pages of deposition testimony of 20 witnesses, the affidavits of the parties and numerous documents. The court of appeals stated in its opinion that in instructing the district court to enter the decree it had "considered all the circumstances concerning Rondeau's violation of section 13(d)...." 500 F. 2d at 1017; (A. 169). It is in circumstances such as those present in this case — which include the acquisition of 16,384 shares of stock from investors who were not told what they should have been told before they sold 2 percent of Mosinee's common stock to Rondeau — that an injunction like the one ordered here is required.

C. "Irreparable injury" in the classic sense of economic injury to the party seeking injunctive relief is not required where that party is acting as a "private attorney general" to enforce the federal securities laws.

In the first Williams Act case petitioner cites for "the necessity of finding irreparable harm in determining if an injunction should be granted" (Br. Pet. 26), the court said this:

> "[I]n view of the public interest in insuring fair practices and honest dealing in the acquisition of corporate shares by tender offers, a showing by plaintiff of irreparable injury in the usual sense is not a necessary prerequisite to the issuance of an injunction." *Cattlemen's Investment Co. v. Fears,* 343 F. Supp. 1248, 1252 (W.D.Okla. 1972) (injunction against voting stock acquired without Schedule 13D filing).

Accord, Sisak v. Wings & Wheels Express, Inc., ['70-'71 Decisions] CCH FED. SEC. L. REP. ¶92,991 (S.D. N.Y. 1970)[24]; *Graphic Sciences, Inc. v. International Mogul Mines Ltd.*, [Current] CCH FED. SEC. L. REP. ¶94,834 (D.D.C. 1974); *Sonesta International Hotels Corp. v. Wellington Associates*, 483 F. 2d 247, 250 (2d Cir. 1973). In this context the courts have abandoned "irreparable injury in the usual sense" in favor of a more flexible and analytical balancing of interests:

> "When presented with the situations such as the instant one, courts have often been hard put to place their finger on a specific irreparable injury flowing from the violation[s]. *See, e.g., Bath Industries, Inc. v. Blot, supra,* at p. 112-13. This is probably due to the fact that what the court seeks to enjoin is future injury. The more intelligent approach, this Court believes, is to examine the interests involved as was done in *Gulf & Western Industries, Inc. v. The Great Atlantic & Pacific Tea Company, Inc.*, Civil No. 73-1223 (2d Cir., filed March 12, 1972) with an eye towards not allowing the violator 'to eat his apple with "unclean hands."' *Gaudiosi v. Mellon*, 269 F. 2d 873, 882 (3d Cir.), *cert. denied*, 361 U.S. 902 (1959).
>
> "The Court must consider the interests of the corporation, all the shareholders (including the dissidents) and the public. *Gulf & Western Industries, Inc. v. The Great Atlantic & Pacific Tea Company, Inc., supra.* . . .
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[24] "The lack of irreparable injury to the individual plaintiffs does not necessarily preclude preliminary injunctive relief where the public interest is involved. *See Virginian Railway Co. v. System Federation No. 40*, 300 U.S. 515, 552 (1937); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 609-10 (1952) (Frankfurter, J.), *Douds v. Int'l. Longshoremen's Ass'n*, 242 F. 2d 803, 811-12 (2d Cir. 1957)." *Sisak, supra* at 90,670. Contrary to petitioner's mistaken assertion (Br. Pet. 28), an injunction was granted in *Sisak*.

> "The interests of Water & Wall and the defendants merit protection but not to the point of countenancing their unlawful failure to file. This Court, however, will attempt to mold its remedy in a fashion which recognizes their interests.
>
> "Finally, the interests of the public are involved. Here ACI assumes the dual role of protecting its own interests and seeing to it that the securities laws are enforced. *J. I. Case v. Borak,* 377 U.S. 426, 432 (1964). Thus where the public interest is involved clearly and pervasively, doubts as to whether the injunction should issue should be resolved in the affirmative." *Water & Wall Associates, Inc. v. American Consumer Industries, Inc.,* [1973 Decisions] CCH FED. SEC. L. REP. ¶93,943, at 93,759 (D.N.J. 1973) (shares acquired in violation of section 13(d) disenfranchised).

It is true that Mosinee suffers no liquidated economic loss from Rondeau's holding without any limitation the 16,384 shares he unlawfully acquired. But that is not of consequence; the public interest must be considered:

> "Finally, in balancing the equities, the public interest must be considered. If G&W is in fact proceeding in violation of the antitrust and securities laws, a preliminary injunction would serve the public interest as much as A & P's private interests. In this regard, by asserting these claims, A&P is assuming a dual role, including that of a private attorney general. Since it is impossible as a practical matter for the government to seek out and prosecute every important violation of laws designed to protect the public in the aggregate, private actions brought by members of the public in their capacities as investors or competitors, which incidentally benefit the general public interest, perform a vital public service. As the Supreme Court said in *J. I. Case Co. v. Borak,* 377 U.S. 426, 432 (1964), private actions provide 'a necessary supplement' to actions

> by the government and 'the possibility of civil damages or injunctive relief serves as a most effective weapon in the enforcement' of laws designed to protect the public interest. Therefore, as in actions brought by the government, doubts as to whether an injunction sought is necessary to safeguard the public interest — when the public interest involved is as clear, pervasive and vital as the record here demonstrates — should be resolved in favor of granting the injunction. *See United States v. First National City Bank,* 379 U.S. 378, 383 (1965); *Mitchell v. Pidcock,* 299 F. 2d 281, 287 (5th Cir. 1962)." *Gulf & Western Industries, Inc. v. The Great Atlantic & Pacific Tea Co., Inc.,* 476 F. 2d 687, 698-699 (2d Cir. 1973).

The Second Circuit manifested the same concern in *GAF Corp. v. Milstein,* 453 F. 2d 709, 721 (2d Cir. 1971):

> "The issuer is the only party which can promptly and effectively police Schedule 13D filings, for it is fair to assume that it scrutinizes carefully changes in its stock ownership — particularly of the sort which can initiate control. And in *Borak,* the Court instructed that '[p]rivate enforcement of the proxy rules provides a necessary supplement to Commission action.' 377 U.S. at 432, 84 S. Ct. at 1560. Even if the Commission had the requisite manpower to delve into the details of each Schedule 13D filing, it does not have the issuer's day-to-day familiarity with the facts which would enable it to appraise accurately the statements in the Schedule. An already overburdened Commission staff, taxed with reviewing increased filings under the securities acts, should welcome 'a necessary supplement' to its action."

The public interests to be served by forbidding Rondeau fully to enjoy the fruits of his wrong are the interests in: (1) encouraging private enforcement of the federal securities laws by providing an incentive to sue

where the damage is public rather than private; (2) fulfilling the expectation of stability in price and management not yet realized by persons who purchased not knowing of Rondeau's activities; and (3) deterring violators of the disclosure requirements, thereby insuring that information highly material to investors' decisions whether to buy, sell or hold securities will be available where shifts in control are possible.

II. ASSUMING *ARGUENDO* THAT THE STATES OF MIND OF THE PERSONS VIOLATING SECTION 13(d) ARE RELEVANT IN FASHIONING A REMEDY, AND THAT THE COURT OF APPEALS ERRED IN FASHIONING A REMEDY FOR THE VIOLATION HERE, NONETHELESS, IT CORRECTLY REVERSED THE DISTRICT COURT'S ENTRY OF SUMMARY JUDGMENT IN FAVOR OF THE DEFENDANTS BECAUSE GENUINE ISSUES OF MATERIAL FACT EXIST AS TO THE KNOWLEDGE, MOTIVES, PURPOSES AND PLANS IN THE RAPID ACQUISITION OF MOSINEE STOCK.

The district court rationalized its rejection of Mosinee's claim for relief by resolving a number of sharply disputed factual issues against Mosinee, drawing all inferences and determining all questions of credibility in Rondeau's favor. Improperly on a motion for summary judgment,[25] the court "found" ". . . that Mr. Rondeau did not know that he was required to file a Schedule 13D . . ." (A. 142); ". . . that there is no concrete evidence in the record warranting a finding that Mr. Ron-

[25] See note 1, *supra*.

deau seriously considered obtaining control of the plaintiff corporation prior to the time that he conversed with his attorney. . ." (at a point in time nearly three months after he should have filed a Schedule 13D) (A. 143); and ". . . that Mr. Rondeau and the other defendants did not engage in intentional covert, and conspiratorial conduct in failing to timely file the 13D schedule." (A. 143).

The court heard no live testimony. There was no evidentiary hearing. The court was in no position to resolve questions of fact. All the court had before it were affidavits and deposition transcripts. Yet the court made findings of fact, and it made such findings as to states of mind, motives, purposes, and knowledge. It wrote an opinion (just as petitioner here wrote his brief) as if there had been a trial. But there has been no trial, and we submit that if this Court holds that the court of appeals struck an inappropriate balance in determining the scope of relief to be granted, then Mosinee is clearly entitled to a trial, so that intention, covertness and conspiratorial involvement can properly be resolved as matters of fact.

On their motion for summary judgment defendants were required to "show that there [was] no genuine issue as to any material fact and that [they were] entitled to judgment as a matter of law." FRCP 56(c). "If, upon the proofs adduced in support of a motion for summary judgment, *any doubt remains* as to the existence of a genuine issue of material fact, such doubt must be resolved against the movant for summary judgment and the motion for summary judgment must be denied." *Zahora v. Harnischfeger Corp.*, 404 F. 2d 172, 175 (7th Cir. 1968), quoting *Moutoux v. Gulling Auto Electric, Inc.*, 295 F. 2d 573, 576 (7th Cir. 1961) (emphasis supplied).

Accord, United States v. Farmers Mutual Insurance Association of Kiron, Iowa, 288 F. 2d 560, 562 (8th Cir. 1961); *Sarnoff v. Ciaglia,* 165 F. 2d 167, 168 (3d Cir. 1947); *Weisser v. Mursam Shoe Corp.,* 127 F. 2d 344, 346 (2d Cir. 1942). *Cf. Sartor v. Arkansas Gas Corp.,* 321 U.S. 620, 627 (1944).

". . . [S]ummary judgment must be denied if the evidence is such that *conflicting inferences* could be drawn therefrom." *Sarkes Tarzian, Inc. v. United States,* 240 F. 2d 467, 470 (7th Cir. 1957) (emphasis supplied). *Accord, United States v. Diebold, Inc.,* 369 U.S. 654, 655 (1962); *Empire Electronics Co. v. United States,* 311 F. 2d 175, 180 (2d Cir. 1962); *Girard v. Gill,* 261 F. 2d 695, 697 (4th Cir. 1958); *United States v. Dollar,* 196 F. 2d 551, 552-553 (9th Cir. 1952); *Paul E. Hawkinson Co. v. Dennis,* 166 F. 2d 61, 63 (5th Cir. 1948); *Ramsouer v. Midland Valley Railroad Co.,* 135 F. 2d 101, 106 (8th Cir. 1943). In their opening brief in the district court, defendants *conceded* that "Rondeau's state of mind, his purpose and plans . . . can be argued and differing inferences might be drawn." (Brief In Support Of Defendants' Motion For Summary Judgment, Appeal Doc. No. 15, p. 20). This court held in *United States v. Diebold, Inc., supra* at 655, that "[o]n summary judgment the inferences to be drawn from the underlying facts contained in [affidavits, attached exhibits and depositions] must be viewed in the light most favorable to the party opposing the motion."

"'When an issue requires determination of *state of mind* [Rondeau's knowledge of the law, his plans and purposes], it is unusual that disposition may be made by summary judgment.'" *NLRB v. Smith Industries, Inc.,* 403 F. 2d 889, 895 (5th Cir. 1968) (emphasis supplied). *Accord, Croley v. Matson Navigation Co.,* 434

F. 2d 73, 77 (5th Cir. 1971); *Empire Electronics Co. v. United States, supra; Consolidated Electric Co. v. United States,* 355 F. 2d 437, 438-439 (9th Cir. 1966). *See, Poller v. Columbia Broadcasting System, Inc.,* 368 U.S. 464, 473 (1962).

"*Credibility* of the witnesses or of the parties [in this case, Rondeau himself] may well be . . . a genuine issue [of material fact]." *United States v. United Marketing Association,* 291 F. 2d 851, 853 (8th Cir. 1961) (emphasis supplied). *Accord, Sartor v. Arkansas Gas Corp.,* 321 U.S. 620, 628 (1944); *Croley v. Matson Navigation Co., supra; Consolidated Electric Co. v. United States, supra.*

Set forth as Mosinee's Counterstatement of the Case are the facts (to which Rondeau himself and others testified) that belie his protestations of ignorance of the law and puerile intent. To reiterate those facts would serve no useful purpose. Suffice it to observe the picture defendants paint: a "knowledgeable and sophisticated businessman" (A. 43, Appeal Doc. No. 15, p. 9) pays nearly a million dollars in a period of three months for stock in a publicly-held company he thinks is mismanaged, but to whom no thought of changing management occurs until after he is through buying. The incongruity of such depiction is obvious, and

> "'A summary judgment upon motion therefor by a defendant * * * should never be entered except where the defendant is entitled to its allowance *beyond all doubt.' Traylor v. Black, Sivalls & Bryson, Inc.,* 8th Cir., 189 F. 2d 213, 216." *Mitchell v. Pilgrim Holiness Church Corp.,* 210 F. 2d 879, 881 (7th Cir.), *cert. denied,* 347 U.S. 1013 (1954) (emphasis supplied).

If defendants' violations were really as non-malefic as now portrayed by defendants, a court might prop-

erly be reluctant to order divestiture. If, on the other hand, they acquired shares implementing a plan to control Mosinee knowing there were laws pertaining to or requiring disclosure but failing to ascertain or observe them, divestiture of those shares acquired after the time of required disclosure seems an entirely appropriate remedy. We submit that in the interest of finally resolving litigation the court of appeals aptly struck the balance most favorable to defendants by fashioning relief short of divestiture. If this Court considers that that determination is error we submit that there is no alternative but a remand for trial.

CONCLUSION

For the reasons stated above, the decision of the court of appeals reversing the district court's summary judgment in favor of all the defendants (including petitioner) should be affirmed in all respects.

Respectfully submitted,

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